IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-826

ELLSWORTH H. MOSHER,
Petitioner

v.

HON. HOWARD T. MARKEY
HON. GILES S. RICH
HON. PHILLIP B. BALDWIN
HON. DONALD E. LANE
HON. JACK R. MILLER
The Chief Judge and the Associate Judges of the United States Court of Customs and Patent Appeals

and

CHIRANJIB K. SARKAR,
Respondents

PETITIONER'S RULE 24(4) REPLY TO RESPONDENT SARKAR

CHARLES A. WENDEL
HAROLD C. WEGNER
STEVENS, DAVIS, MILLER
& MOSHER
1911 Jefferson Davis Highway
Suite 600, Crystal Mall 1
Arlington, Virginia 22202
Telephone (703) 920-8900
Attorneys for Petitioner

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Respondent Sarkar's Brief in Opposition appears largely to be an *ad hominem* argument that does not fully address the public interest issue raised by the petition. Quite understandably, Sarkar places heavy emphasis upon his own private

interest with little or no real consideration, either in principle or on the merits, to the larger public interest issue raised in the petition.

For the sake of completeness it remains only to respond briefly to errors appearing in the respondent Sarkar's brief:

Page 3, first paragraph: The record shows something quite different. As indicated in the decision of the court below (App. 1-b), Sarkar filed his certified transcript of the proceedings in the PTO on February 13, 1978 simultaneously with "a timely appeal". He therefore had perfected his appeal on that day. But the lower court's decision on closure was not handed down until May 11, 1978 (App. 1-b). It is therefore difficult to see how Sarkar could have relied upon the lower court's decision to hold the case *in camera* at the time he perfected his appeal nearly three months earlier.

Page 3, third full paragraph: Sarkar erroneously asserts that petitioner is "attempting to now bring Sarkar's record before this Court". This is something petitioner neither desires nor would find it possible to do so long as the record in the court below remains sealed.

Page 5, second paragraph: Sarkar asserts that the issuance of the patent (in the event of a favorable* decision) makes public the entire record, thus rendering the petition moot. This anticipation of what might happen is somewhat questionable in view of the fact that the lower court's order appears in turn to be a closure order *without any qualification.* See Appendix 5-b. In any event, Sarkar's suggestion of possible mootness is not well taken. It is well settled that where a substantial question involving the public interest is likely to be a recurring one, the fact that in the particular case under consideration events may have rendered moot any possible relief as to the particular parties is not sufficient to deprive the Court of jurisdiction. *Moore* v. *Ogilvie,* 394 U.S. 814 (1969) at 816; *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115 (1974) at 125-6.

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* In the actual event, the C.C.P.A. on December 7th *affirmed* the rejection of all of Sarkar's claims.

Page 6, first full paragraph: Sarkar asserts that if this petition were to be granted "as to the *Sarkar* case," the appellate process on the merits "would have to stop". This overlooks the fact that both the court below and the Chief Justice (as Circuit Justice for the District of Columbia Circuit) have already denied a motion for stay and an application for stay, respectively.

Page 6, second full paragraph: Sarkar asserts that if this petition were granted "the C.C.P.A. record would be sent to the U.S. Supreme Court". It is difficult to see why this should be so since the granting of the petition would merely mean that this Court agrees to hear the question involved, without requiring for its resolution the *actual production* of the record.

Page 8, first paragraph: This paragraph overlooks the fact that the slipsheet opinion of the lower court did not reveal the address of Sarkar or the name(s) and address of Sarkar's attorney(s). The latter information was revealed *for the first time* in the unofficial report of this case in the weekly advance sheets of the United States Patents Quarterly for June 19, 1978 (197 U.S.P.Q. 788). Since petitioner's motion or petition was filed in the court below on June 8, 1978 (App. 2-c), it obviously was *impossible* for petitioner to effect service at that time. See also the Appendix at 3-c and the footnote by the court below in *In re Mosher* appearing in the Appendix at page 1-a, footnote 1.

CONCLUSION

If all that was "endangered" in the case at bar were Sarkar's trade secrets, no one could reasonably expect this Court to be particularly interested. What is *really* at stake here, however, is the unbroken tradition of 139 years of open court records and open court hearings in direct appeals from the Patent Office. This is the issue of profound public importance that takes this case out of the ordinary and makes it certworthy. This Court should grant certiorari with a view to ruling on the merits of the closure order of the court below.

Respectfully submitted,

CHARLES A. WENDEL
HAROLD C. WEGNER
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& MOSHER
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